

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

RUSSELLS' AT ORCAS, INC.<sup>1</sup>

Employer

and

Case 19-RC-13752

INLANDBOATMEN'S UNION OF THE PACIFIC,  
MARINE DIVISION OF ILWU

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce<sup>3</sup> exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>1</sup> The Employer's name appears as corrected at hearing.

<sup>2</sup> Timely briefs were submitted by both parties and they have been duly considered.

<sup>3</sup> While no stipulation was entered into evidence showing there to be a question concerning representation, the facts on the record and the arguments made by the parties make it evident that such a question exists.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All traffic directors and ticket sellers employed by the Employer at its Orcas Island, Washington, facility; excluding guards and supervisors as defined in the Act.

The Employer, a Washington State corporation, is engaged in the management of the ferry terminal at Orcas, Washington. It is directed in such endeavors by Margaret Russell and Mary Russell, whose titles are "agent." The Employer operates pursuant to the provisions of a contract with the Washington State Ferry System ("WSF"), which provides marine transportation for passengers and vehicles among the San Juan Islands, of which Orcas is a part, and in the Seattle, Washington, vicinity. The Petitioner seeks to represent a unit of terminal employees. While the Employer agreed in most respects, it argues that Jim Frank should be excluded as a supervisor. The Petitioner contends he is not a supervisor. While the Petitioner initially argued that employees Julia (Judy) Talman, Sonja Clark and Ron Rebman should be excluded on community of interest grounds, in its post-hearing brief it withdrew its objection to their inclusion. Based upon that change in position and the record evidence, I shall include Talman, Clark and Rebman in the unit found appropriate herein.

The Employer's facility consists of a boat ramp, several parking lots where vehicles await loading, two booths devoted to the sale of tickets and direction of drivers to particular lots, and a third booth that sells tickets and also includes a gift shop. The employees in the gift shop sell tickets, souvenirs, and liquor. All employees, but particularly those working in the booths and gift shop, answer questions posed by passengers, many of whom are tourists, especially during the summer months. All but one employee work during the day shift; one employee works the evening shift alone.

The Employer's operations are very informal. The work is routine and employees work together in a cooperative spirit. Mary Russell is present five days a week at the facility, and it appears that while Margaret was at one time very active in directing the Employer's operations, she is less so now. The terminal operates seven days a week. Mary Russell does not designate a particular individual to be in charge in her absence.

Jim Frank is the Employer's most senior<sup>4</sup> employee, having worked for it for approximately eight years. He works the day shift and normally operates the ramp which spans the gap between ferry and shore for the loading and unloading of passengers and vehicles. As ramp operator, Frank directs the loading and unloading of passengers and vehicles, counting the vehicles carefully to ensure the Employer's quota per boat<sup>5</sup> is not exceeded, and alerts the ferry personnel in the event of a medical priority vehicle and bundles the tickets for transport to Anacortes (evidently a WSF site). His counterpart on the evening shift performs the same duties.

Frank was employed for a number of years prior to the death of Margaret Russell's husband, who apparently managed the terminal. In what Margaret Russell described as the "turmoil" of that immediate situation, Frank assisted in preparing a written list of instructions and

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<sup>4</sup> The next most senior employee has been employed only three or four years.

<sup>5</sup> The ferries travel among the various islands, each of which is given a quota of cars and "talls", or trucks, it is allowed to load at one time. The quota is established by the WSF.

training points for employees. The other individual engaged in that endeavor was the bookkeeper - now a former employee - whom neither party asserts to have been a supervisor. Margaret Russell testified that these instructions are still in use and that Frank's training of new employees signifies his supervisory status. Frank and other employees testified that these instructions have not been used in years and that new employee training is done informally by experienced personnel on an on-the-job basis.

It is the Employer's assertion that Jim Frank is empowered to hire employees and has exercised this authority. Neither of the Russells could testify as to when or how such authority was conferred upon Frank. Margaret Russell testified that Frank hired employee Jack Goula approximately three or four years ago. Both she and Mary Russell testified that they first learned of Goula's existence when they observed him directing traffic with Frank. Both Frank and Goula testified that while Goula approached Frank about the possibility of being hired and that Frank introduced Goula to the Russells for an interview and possible hire, Frank did not hire Goula. When Goula testified, the Employer did not question him concerning his hire. Neither of the Russells testified concerning the existence or details of the interview meeting Frank and Goula stated Goula had with them. The most recent hire was Rob Rebman, who was hired by Mary Russell without participation by Frank. Other employees whose hires were in evidence were Rick Boucher and Jerry Bryant, also hired without participation by Frank.

The employees' work schedules are made out weekly by Mary Russell. She and Margaret Russell testified that Jim Frank has changed employees' working hours. Frank and employees testified that while it may be Frank's handwriting on the forms, such changes are made only after affected employees discuss the matter and agree. The employees testified that Frank has not instructed them concerning which hours they are to work, does not call them in if the Employer needs extra employees, is not involved in their working overtime or receiving time off for emergencies or personal business and, in general, does not exercise any authority over them in these matters.

Margaret Russell testified that Frank was involved in the termination of an employee for embezzlement two years prior to the hearing. Her testimony reveals that he became suspicious of the employee's activities, took it upon himself to investigate and then reported his findings to Margaret, who alerted the police and discharged the employee. There was no record evidence to show that Frank made any recommendation in the matter. Further, Frank testified that Margaret Russell made her own independent assessment of the evidence; the Employer did not speak to that issue. A second employee was terminated for drinking or having a hangover on the job. Margaret Russell testified that Frank stated to her, "He need(s) to go home." Margaret thereupon gave the employee his check and dismissed him.

Evidence was introduced concerning two suspensions occurring five or six years ago. Both were effected by Margaret Russell. There was no evidence to show that Frank had a role.

The Employer has notified WSF that Jim Frank is its designated contact person in the event of an emergency situation. However, the record shows that the only time such a contact needed to be made, WSF called Goula at home instead of Frank. Jim Frank has attended several meetings called by WSF either alone or with one of the Russells, two routing meetings and one training meeting. Policy is not debated or decided at such meetings. Rather, WSF distributes information concerning its schedules, boat changes, and WSF regulations or procedures. Other such information is received by the Employer via mail sent on the ferry. The employee who operates the ramp receives this packet. The Employer asserted that only Frank takes it upon himself to open the mail and even to post it for the employees, even though it is

addressed to the "agent", meaning one of the Russells. All such mailings, however, are unsealed and appear routine in nature, dealing with such matters as schedule changes and boats being replaced on line because of repairs. Additionally, employees other than Frank also open the mail.

Frank is the only individual who is salaried other than Mary Russell. He receives somewhat more on a per-hour basis than do other employees, but less than Russell. Frank's testimony that at one time all employees were salaried and that gradually the Employer began to pay newly hired employees hourly rates went un rebutted. All receive the same benefits.

### **Analysis and Conclusion**

Section 2(11) of the Act defines a supervisor in the following manner:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct the, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When establishing this definition, Congress stressed that only persons vested with genuine management prerogatives be deemed supervisors, as opposed to "...straw bosses, leadmen, ... and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985) (citing S. Rep. No. 105, 80th Cong., 1 Sess. 4 (1947), aff'd in relevant part 794 F.2d (9th Cir. 1986). It is the Board's duty not to construe the term too broadly inasmuch as individuals found to be supervisors are denied rights the Act is intended to protect. The burden of establishing supervisory status rests on the party asserting its existence. *Bennett Industries*, 313 NLRB 1363 (1994); *California Beverage Co.*, 283 NLRB 328 (1987).

I am persuaded that the Employer has failed in its burden of showing Jim Frank to be a supervisor. That his knowledge and experience are relied upon by the Employer is undoubted. However, there is no solid evidence that he possesses any of the indicia necessary to find him excluded from the unit as a supervisor. While the Employer asserts he hires employees, three recent hires in the record were ones in which he played no part. As to the hire of Jack Goula, the evidence is inconclusive. Although the Employer insists it was Frank who hired Goula, that is disputed by both Frank and Goula, and no documentary evidence was submitted to show Goula's hire to have been effected earlier than his interview with the Russells. As to discharging employees, the Employer's own testimony fails to show Frank to have recommended the termination of the employee caught embezzling, and it was Margaret Russell who decided to discharge him. The evidence regarding the employee who was drunk or hungover fails to convince me Frank had a supervisory role. Thus, while he may well have said the employee should "go home", the actual decision to discharge, as opposed to go home and "sleep it off", was made by Margaret Russell. The fact that an individual can send an employee home for drinking (let alone merely telling the owner the employee should go home) is insufficient to make one a supervisor. *Brown & Root, Inc.*, 314 NLRB 19 (1994); *Chevron Shipping*, 317 NLRB 379 (1995). The only evidence regarding suspensions shows the absence of input from Frank. Finally, there is no conclusive evidence to show that Frank regularly schedules employees or that any of his actions in this area have been accompanied with the independent judgment and discretion necessary to find one a supervisor. Thus, Mary Russell prepares the weekly schedule. Once, during her confinement in the hospital, Frank took it upon

himself merely to copy her schedule from the previous week until she could return. The mere repeating of a schedule already prepared by the Employer by its most senior employee, particularly in an emergency situation, hardly makes him a supervisor. Additionally, evidence presented by the Petitioner shows that any schedule changes appearing in Frank's handwriting have resulted from employees cooperatively rearranging their work hours to meet their needs. In this regard, I stress the obviously informal nature of the entire operation. Frank is not empowered to require employees to work overtime. In fact, the record shows that when one employee, Piersen, appeared early for work, Mary Russell told her Jim Frank was "not her supervisor" and that overtime must be cleared with Mary Russell alone. Shortly after the petition was filed in this matter, the Employer issued a memo to its employees to the effect that all overtime must be authorized by either Mary or Margaret Russell.

There is no evidence to show that Frank is held responsible for the work of the group, that he or the other employees were ever informed that Frank is a supervisor, that he is involved in promotions, layoff or recall decisions, rewarding or evaluating employees, or that he has any role whatsoever in directing or assigning work. That he is salaried and they hourly paid is not determinative in any event, and certainly not when un rebutted evidence shows this fact to have been the result of mere historical evolution. That his pay is higher on a per-hour basis than other employees is unsurprising in view of his status as most senior employee. His assistance in writing training instructions is not determinative of supervisory status, nor is any role he plays in instructing new employees, a task shared by all unit employees. His attendance at three WSF meetings and the fact he might open and post WSF notices<sup>6</sup> for employees does not confer supervisory status. Frank has no authority to determine or alter Employer or WSF policy. In fact, when he once overloaded a ferry with more "talls" than the Employer's quota allowed, he was reprimanded. And while the Employer asserts that Frank has been designated to WSF as the Employer's emergency contact, the only evidence in the record shows he has never been contacted by WSF in such cases, but that another individual has and that the Employer does not dispute the unit inclusion of that individual. In sum, he is an obviously skilled, experienced, important and trusted employee, but not a statutory supervisor.

Accordingly, in accordance with the foregoing and the record in its entirety, I find Jim Frank not to be a supervisor and I hereby include him in the unit.

There are approximately seven employees in the appropriate unit.

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<sup>6</sup> Mary Russell testified that "...a lot of it is drivell." TR 169. Additionally, Margaret Russell testified that she discusses policy with all employees, not just Frank. While she also stated that she relies upon Frank in interpreting WSF policy and procedures, that does not confer supervisory authority. Rather, the record as a whole shows great reliance placed upon Frank's experience in such matters.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INLANDBOATMEN'S UNION OF THE PACIFIC, MARINE DIVISION OF ILWU.

### **LIST OF VOTERS**

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before March 4, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 11, 1999.

**DATED** at Seattle, Washington, this 25th day of February, 1999.

/s/ PAUL EGGERT

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